In the Supreme Court of the United States
October Term, 1972

No. 71-1580

ANTHONY B. CATALDO and ADA W. CATALDO,

Petitioners,

v.

UNITED STATES OF AMERICA

On petition for a writ of Certiorari to the
United States Court of Appeals for the
Second Circuit.

PETITIONERS' REPLY

It is obvious from the nature of the opposition of the United States to this petition that it has nothing to say against the differences between this case and Flora v. United States. Respondent does not deny that the assessment in this case is a fraudulent one, a fraudulent act in the sense that it must be regarded as an act void ab initio. As such, the assessment has no standing in law, as an assessment. No lawful assessment being

present there can be no tax lawfully due. Petitioners' suit can be regarded as one seeking to recover money had and received as spelled out in Serian Lamp Co. v. Manning, Collector et al., (2nd Cir.), 123 F.(2) 776. At the same time, this suit may test the validity of the assessment and to have it stricken as totally void; see Miller v. Standard Nut Margarine Co., 284 U.S. 498 and Enochs v. Williams Packing etc., 370 U.S. 1.

Consequently, the issue is now squarely before this court, shall it extend "the pay first, litigate late rule" of Flora v. U.S. to fraudulent assessments or shall it clarify for the trial courts that an assessment that is not in law an assessment, according to the facts of the pleader, be an exception to Flora's rule.

Should this court refuse to review this question, then it is respectfully requested that it order the continuance of this suit upon the condition that petitioners pay the full amount demanded within a reasonable time, such as ninety days, or if it cannot enter such an order that it remand the matter to the Court of Appeals to enter such an order. This solution was applied by the Court of Appeals, Second Circuit in Botta v. Scanlon, 314 F.(2) 392, 394.

The amount of this spurious assessment is so great and burdensome in the circumstances of these petitioners that, it is respectfully suggested, that equitable principles of justice ought to be applied to find a way for petitioners to recoup, what is to them, a large sum of money that will have been unlawfully exacted from them. Furthermore, petitioners have never been given a hearing on the merits. A ninety day letter, instead of the thirty day letter, was issued upon the fraudulent audit and no Appellate review was afforded petitioners. They were obliged to go to court with no conference with the head of the department

or with the Appellate Division. Then, when they went to court, there appeared to be a choice of two courts, but the choice of the district court was wrong according to the courts below. The dismissal of this suit deprives petitioner of the opportunity to a hearing on the merits unless either the dismissal is expressly stated to be without prejudice to a later suit after payment of the assessment is completed or this suit is permitted to continue upon payment of the balance of the amount required by the assessment.

WHEREFORE, it is respectfully prayed that this honorable court grant a review of the question, or if it does not wish to do so, to preserve the rights of the petitioner to a hearing on the merits of their claim that the assessment was wrongful whether by a continuance of this suit or by directing the dismissal be without prejudice.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney pro se and
for co-petitioner

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and seventy-two.

Present: HON. HENRY J. FRIENDLY
Chief Judge

HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD

Circuit Judges

Anthony B. Cataldo and Ada W. Cataldo,
Plaintiffs-Appellants,

v.

United States of America,
Defendant-Appellee.

DOCKETED AS A JUDGMENT 72,201 ON Jan. 31, 1972
71 Civ. 84

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro
Clerk

A true Copy,

s/ A. David Fusaro

Clerk